

2009 WL 8486266 (Hawai'i Cir.Ct.) (Trial Motion, Memorandum and Affidavit)  
Circuit Court of Hawai'i.  
Honolulu County

Tsutae IWAMOTO, Plaintiff,

v.

Glenn T. HIRONAGA, Donald Tanida, New Century Mortgage Corporation, Helen Bench Realty Inc., Charles Bench, Yu Neu Bench, Hironaga Developments, Inc., H&L Development, LLC, Todd Lemkau, Krc Consulting, Inc. Kimberly Lemkau, Avis Mortgage Incorporated dba Nave Funding, US Bank National Association, as Trustee Relating to the Asset-Backed Pass-Through Certificates, Series 2003-He4, the Bank of New York Mellin Fka the Bank of New York, Trustee for the Certificateholders Cwmbbs, Inc., Alternative Loan Trust 2006-A1 Mortgage Pass-Through Certificates, Series 2006-Oa1, John Does 2-10, Jane Does 2-10, Doe Corporations 5-10, Doe Partnerships 1-10, Doe Entities 1-10 and Doe Governmental Agencies 1-10, Defendants.

No. 1CC071243012.  
December 24, 2009.

**Memorandum in Support of Motion**

[Louise K.Y. Ing](#), [Thomas E. Bush](#), Attorneys for Plaintiff Tsutae Iwamoto.

Plaintiff Tsutae Iwamoto ("Plaintiff") seeks default judgment against Defendants Glenn T. Hironaga ("Hironaga"), Donald Tanida ("Tanida"), Todd Lemkau ("Lemkau"), Hironaga Developments, Inc. ("Hironaga Developments"), H&L Developments, LLC ("H&L") and KRC Consulting, Inc. ("KRC") (collectively referred to as the "Defaulted Defendants") on the following Counts of her Second, Third and Fourth Amended Complaints:

<b>Defaulted Defendant</b>	<b>Counts</b>
Glenn Hironaga	I, II, V, VI, VII, VIII, IX, X, XIII, XIV, XV, XVI, XVII
Donald Tanida	I, II, III, IV, V, VII, IX, X, XIII
Hironaga Developments, Inc.	VII, X, XIV, XV, XVI, XVII
Todd Lemkau	V, VII, IX, X, XIV, XV, XVI, XVII
H&L Developments, LLC	VII, X, XIV, XV, XVI, XVII
KRC Consulting, Inc.	VII, X, XIV, XV, XVI, XVII, XVIII <sup>1</sup>

**I. JUDGMENT SHOULD BE ENTERED AGAINST THE DEFAULTED DEFENDANTS.**

**A. The Defaulted Defendants Cannot Contest Liability**

While one or more of the Defaulted Defendants may have the right to contest the *amount of damages* to be sought against them at any trial or proof hearing in this matter for any of the counts against them (other than Defendants Hironaga, Tanida, Hironaga Developments, Inc., H&L Developments LLC, and Todd Lemkau as to Count XVII as a judgment as already been

entered against them), they cannot be allowed to contest liability for the damages. *See Occidental Underwriters of Hawaii v. American Security Bank*, 5 Haw. App. 431, 433, 696 P.2d 852, 854 (1985) (error to allow defaulted defendant to contest liability). Moreover, where a defaulted party has not formally entered an appearance in the action, they are not even entitled to notice of the trial or proof hearing to contest the amount of damages. *Pogia v. Ramos*, 10 Haw. App. 411, 418-19, 875 P.2d 1342, 1346 (1994) (HRCP Rule 55(b) does not require notice of trial or proof of damages hearing as to defaulted defendants who have never appeared in the action).

## **B. Factual Allegations for Claims Pleaded Against the Defaulted Defendants.**

Here, the factual allegations that cannot be contested by any of the Defaulted Defendants are generally as follows: Ms. Iwamoto is an **elderly** woman. She and her first husband purchased the Manoa Property in 1963. Mrs. Iwamoto has lived there continuously since 1983. In 1993, her adult son, Murray, tried to commit suicide by hanging himself. He was not successful but as a result of his suicide attempt, he became completely mentally disabled and now requires 24-hour assistance, seven days a week. Mrs. Iwamoto has taken care of her son since 1993 at her Manoa Property.

In 2002, Mrs. Iwamoto met Defendant Glenn Hironaga who was a handy man that she hired to do repairs at the Manoa Property. One of Mr. Hironaga's workers was Defendant Donald Tanida. Over time, Defendant Hironaga ingratiated himself with Iwamoto, earning her trust and confidence, and holding himself out to be a licensed contractor. (In fact, he was not. DCCA records show that in July 2001, his contractor's license was revoked as a result of numerous acts of misconduct. *See* Ex. J-76.

Towards the end of 2002, Defendant Hironaga convinced Mrs. Iwamoto that she should go into business with him to develop property on Oahu. This offer was attractive to Mrs. Iwamoto, who lives on a fixed income and is concerned about providing for her mentally disabled son. At Defendant Hironaga's urging, Iwamoto cashed out her life insurance annuity (*see* Ex. J-2), and got a VISA card (*see* J-3) as well that Defendant Hironaga used. Defendant Hironaga further got Iwamoto to sign documents which Iwamoto thought would allow her to get a loan on her property, though Hironaga explained that she needed a "co-signer" who was to be Defendant Tanida.

In fact, Defendants Hironaga and Tanida had Iwamoto sign over her home to Defendant Tanida in order to get a mortgage on the Manoa Property from New Century Corporation. The money from the Manoa Property (as well as Iwamoto's other assets, that is, her life insurance annuity payout and her VISA card) were then apparently used to have Iwamoto acquire 92-267 Hoalii Place, which was developed and sold in December 2004. However, at that sale, proceeds were diverted to associates of Defendant Todd Lemkau (Edward Murphy and Mary Drader) with no justification shown for this diversion, and the remaining funds were taken by the Bench Defendants and Defendant Hironaga Development, Inc.

As alleged by Plaintiff, these sale proceeds (which should have gone to pay off the Manoa Property mortgage and to benefit Iwamoto) were used by Hironaga and Lemkau for other Hawaii properties that they purchased and/or controlled in Lemkau's name and in the names of their companies, i.e., Defendants Hironaga Developments, Inc., H&L Developments, LLC and KRC Consulting, Inc. These properties are identified in the Complaint as 92-1375 Kuamu Street and the Ululaau Property.

## **C. Damages and Relief Requested Against the Defaulted Defendants.**

### **1. Damages Calculation.**

The factual allegations support claims for fraudulent inducement (Count I), **abuse** of a fiduciary relationship and aiding and abetting that **abuse** against Defendants Hironaga and Tanida (Counts I and II); constructive trust and quiet title to the Manoa Property against Defendant Tanida (Counts III and IV); fraud, breach of fiduciary duties, aiding and abetting breach of fiduciary duties, conversion, conspiracy and unjust enrichment against Defendants Hironaga, Tanida, Lemkau, Hironaga Developments, Inc., H&L Developments LLC and KRC Consulting (Counts V, VII, IX, X and XII). In addition, Iwamoto is entitled to an accounting from Hironaga (Count VIII).

Iwamoto's damages can be calculated by adding up (A) her out of pocket costs contributed towards the development of 92-267 Hoalii Place, and then adding to that (B) the profit the sale that property, which would consist of the monies to be realized from its sale minus the costs of purchasing and developing the property. The documents supporting these damages amounts and testimony regarding these documents have already been introduced into evidence in the bench trial in this matter.

A. Iwamoto's out of pocket costs are \$350,000 (mortgage on Manoa Property, Ex. J-83, J-15) plus \$25,836.57 (payout of her life insurance annuity, Ex. J-2) and \$5,000 (her VISA card limit, Ex. J-3). These costs total \$380,836.57.

B. Monies from the sale of 92-276 Hoalii Place that should have gone to the seller can be determined by reviewing the final escrow settlement statement (Ex. J-62 & J-63). From this statement the monies are as follows: \$186,974.85 (monies paid to the Bench Defendants for their two mortgages and the additional \$60,000 they received at closing), plus \$207,000 (money paid to Murphy), plus \$312,000 (money paid to Drader), plus \$373,823.19 (money paid to Hironaga Development, Inc.). These amounts total \$1,079,798.04 (*i.e.*, the sum of \$186,974.85 \$207,000 \$312,000 373,823.19). From this amount, the costs to buy and develop the property must be subtracted. These costs consist of \$190,000 (the sales price to buy the property, Ex. J-19 at p.1) and \$475,000 (the accepted value of the development work Ex. J-77), which total \$665,000. \$1,079,798.04 minus \$665,000 equals \$414,798.04.

Iwamoto's damages are thus (A) \$380,836 (total out of pocket costs) (B) \$414,798.04 (total profit from sale of 92-267 Hoalii Place), which equals: \$795,634.61. However, Consistent with Iwamoto's counsel's representations at Court prior to the star of the Bench trial, Iwamoto will not seek a judgment in excess of the amount already awarded as to Count XVIII, which is **\$621,105.37**.

## **2. Other Relief.**

Finally, Iwamoto is entitled to a judgment adjudicating in her favor her quiet title action as to Defendant Tanida, and that as to Defendant Tanida, she holds equitable and legal title to the Manoa Property and that a constructive trust is imposed in favor on the Manoa Property as to any interest of Tanida in that property (Counts III and IV). Further, Iwamoto is entitled to a constructive trust imposed in her favor as to any interest of Defendants Hironaga, Lemkau, Hironaga Developments, Inc., H&L Developments, Inc., and KRC Consulting, Inc. claim with respect to 92-1375 Kuamu and the Ululaau property (Counts XIV, XV, XVI and XVII).

## **II. CONCLUSION**

For the reasons set forth above, Plaintiff respectfully requests that the Motion for Default Judgment be granted and that the Court enter Final Judgment against the Defaulting Defendants as follows:

1. Judgment is entered in favor of Plaintiff and against Glenn T. Hironaga, Donald Tanida, Hironaga Developments, Inc., Todd Lemkau, H&L Developments, LLC and KRC Consulting, Inc., partly and severally in the amount of \$621,105.37.

2. Final Judgment is entered in favor of Plaintiff and against Donald Tanida in that as to Donald Tanida, Plaintiff holds legal and equitable title to the property located at 3489 Manoa Road, Honolulu, Hawaii, 96822 (T.M.K. No. 1-2-9-069-063) (hereinafter "Manoa Property"), and a constructive trust is imposed in favor of Plaintiff and against Donald Tanida as to any interest, legal or equitable, of Tanida in the Manoa Property.

3. Final Judgment is entered in favor of Plaintiff and against Glenn T. Hironaga, Hironaga Developments, Inc., Todd Lemkau, H&L Developments, LLC and KRC Consulting, Inc. in that a constructive trust is imposed in favor of Plaintiff and against Glenn T. Hironaga, Hironaga Developments, Inc., Todd Lemkau, H&L Developments, LLC and KRC Consulting, Inc., as to

any interest, legal or equitable, of any of these parties in property located at 92-1375 Kuamu Street, Kapolei, Hawaii (T.M.K. No. 1-9-2-026-090) and 99-121 Ululaau Place, Honolulu, Hawaii (T.M.K. No. 1-9-9-017).

DATED: Honolulu, Hawaii, December 24, 2009.

#### Footnotes

- 1 As this Court may recall, Iwamoto previously obtained Default Judgment against Defendants Glenn Hironaga, Donald Tanida, Hironaga Developments, Inc., Todd Lemkau and H&L Developments, Inc. on Count XVIII, for breach of the settlement agreement with Iwamoto. Each of these Defendants had been served with either the Second or Third Amended Complaint. However, no judgment was sought at that time against KRC Consulting (one of the parties to this count) because this entity had not yet been served at the time the Motion for Default Judgment was filed. However, KRC Consulting, Inc. has since been served with the Fourth Amended Complaint and notice of entry of default entered against it. (As to the Defaulted Defendants, there were no substantive changes between the Second, Third and the Fourth Complaint.) Accordingly, Iwamoto will seek a judgment against KRC Consulting for the same amount as was entered against the other defendants on Count XVIII.

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